RECORD AND BRIEFS

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In the Supreme Court of the United States

RICHARD ARMSTRONG AND LISA HETTINGER,
PETITIONERS

v.

EXCEPTIONAL CHILD CENTER, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF TEXAS, ALABAMA, ALASKA, ARIZONA, ARKANSAS, CONNECTICUT, DELAWARE, GEORGIA, HAWAII, INDIANA, KANSAS, MARYLAND, MICHIGAN, MISSISSIPPI, NEBRASKA, NEVADA, NORTH DAKOTA, OHIO, OKLAHOMA, OREGON, PENNSYLVANIA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, UTAH, WISCONSIN, AND WYOMING AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Does the Supremacy Clause give Medicaid providers a private right of action to enforce 42 U.S.C. § 1396a(a)(30)(A) against a State where Congress chose not to create enforceable rights under that statute?

2. If Medicaid providers have a private right of action, are a State's Medicaid provider reimbursement rates preempted by § 1396a(a)(30)(A) where they do not bear a reasonable relationship to provider costs and remain in place for budgetary reasons?

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INTEREST OF AMICI

The Ninth Circuit and many other courts of appeals have held that the Supremacy Clause authorizes private lawsuits to enforce *every* federal statute against state officials—even when Congress has refused to provide a private right of action to enforce that federal statute, and

even when the statute does not create federal "rights" enforceable under 42 U.S.C. § 1983. *See, e.g.*, *Indep. Living Ctr. of S. Cal. v. Shewry*, 543 F.3d 1050, 1058 (9th Cir. 2008); *Planned Parenthood of Hous. & Se. Tex. v. Sanchez*, 403 F.3d 324, 333 (5th Cir. 2005). The Tenth Circuit recently rejected this view, establishing a circuit split. *See Planned Parenthood of Kan. and Mid-Missouri v. Moser*, 747 F.3d 814, 822–36 (10th Cir. 2014). The amici curiae States have an interest in having this circuit split resolved, as the States have been subjected to many unwarranted lawsuits on account of the Ninth Circuit's misguided interpretation of the Supremacy Clause.

REASONS FOR GRANTING THE WRIT

I. THERE IS A DEEP SPLIT AMONG APPELLATE COURTS OVER WHETHER THE SUPREMACY CLAUSE CREATES AN IMPLIED RIGHT OF ACTION TO SUE STATE OFFICIALS

In *Douglas v. Independent Living Center of Southern California, Inc.*, 132 S. Ct. 1204 (2012), this Court granted certiorari to decide whether the Supremacy Clause authorizes private lawsuits against state officials who violate a federal statute—even when Congress has refused to provide a private right of action to enforce that statute. *See Maxwell-Jolly v. Indep. Living Ctr. of S. Cal., Inc.*, 131 S. Ct. 992 (2011). But the Court did not resolve this question in *Douglas*; it disposed of the case on other grounds.

Since the Court's ruling in *Douglas*, a circuit split has developed on this issue. The Tenth Circuit expressly re-

jected the Ninth Circuit's holding that the Supremacy Clause confers a private right of action whenever a state official is accused of violating a federal statute. *See Moser*, 747 F.3d at 822–36. The Seventh Circuit declared that the Ninth Circuit's interpretation of the Supremacy Clause is "highly doubtful." *Planned Parenthood of Ind., Inc. v. State Dep't of Health*, 699 F.3d 962, 983 (7th Cir. 2012). And the Supreme Judicial Court of Massachusetts specifically held that the Supremacy Clause may not be used to enforce 42 U.S.C. § 1396a(a)(30)(A) against state officials. *See Boston Med. Ctr. Corp. v. Sec'y of the Exec. Office of Health & Human Servs.*, 974 N.E.2d 1114, 1128 (Mass. 2012) ("The plaintiffs … attempt to make the supremacy clause a source of Federal rights by claiming that it provides a private right of action that is not available under § 1396a(a)(30)(A). We agree with Chief Justice Roberts's view on the matter, as expressed in *Douglas*.").

When this Court granted certiorari in *Douglas*, there was no appellate-court split on whether the Supremacy Clause establishes an implied right of action to bring "preemption" claims against state officials. Now there are two appellate courts that have explicitly rejected that view—and another that has called it into doubt. The need for this Court's resolution is even more urgent than it was in *Douglas*. And the Court now has the benefit of a thoughtful and scholarly opinion from the Tenth Circuit that rejects the approach of the Ninth Circuit and the other courts of appeals. *See Moser*, 747 F.3d at 822–36; *see also The Wilderness Society v. Kane County*, 581 F.3d 1198, 1233–34 (10th Cir. 2009) (McConnell, J., dissenting). There is little if anything to be gained from fur-

ther percolation, as almost every court of appeals has weighed in on this question.

By our count, the First, Second, Third, Fourth, Fifth, Sixth, and Ninth Circuits have unambiguously established that private litigants may sue state officials directly under the Supremacy Clause even absent a statutory cause of action. *See P.R. Tel. Co., Inc. v. Mun. of Guayanilla*, 450 F.3d 9, 15 (1st Cir. 2006) ("A party may bring a claim under the Supremacy Clause that a local enactment is preempted even if the federal law at issue does not create a private right of action.") (citation and internal quotation marks omitted); *Burgio & Campofelice v. N.Y. State Dep't of Labor*, 107 F.3d 1000, 1006 (2d Cir. 1997) ("[T]he Supremacy Clause creates an implied right of action for injunctive relief against state officers who are threatening to violate [federal law]."); *Lewis v. Alexander*, 685 F.3d 325, 345–46 (3d Cir. 2012) ("[T]he Supremacy Clause creates an independent right of action where a party alleges preemption of state law by federal law.") (citation omitted); *United States v. South Carolina*, 720 F.3d 518, 526 (4th Cir. 2013) ("We hold that under the Supremacy Clause [the] Plaintiffs have an implied right of action to seek injunctive relief from South Carolina's Act 69 on federal preemption grounds."); *Sanchez*, 403 F.3d at 333 (holding that the Supremacy Clause establishes an implied cause of action to enforce preemptive federal legislation against state officials); *Chase Bank USA, N.A. v. City of Cleveland*, 695 F.3d 548, 554 (6th Cir. 2012) ("The federal law with purported preemptive effect need not expressly provide a cause of action against preempted state law; the cause of action is implied under the Supremacy Clause ..."");

Shewry, 543 F.3d at 1065 ("[A] private party may bring suit under the Supremacy Clause to enjoin implementation of state legislation allegedly preempted by federal law."). The Eleventh Circuit has cases that look both ways on this question. *Compare Ga. Latino Alliance for Human Rights v. Governor of Ga.*, 691 F.3d 1250, 1261 (11th Cir. 2012) ("The propriety of bringing a challenge for injunctive and declaratory relief on the grounds that a state law is preempted by virtue of the Supremacy Clause has gone largely unquestioned.") *with Legal Envtl. Assistance Found., Inc. v. Pegues*, 904 F.2d 640, 643 (11th Cir. 1990) (rejecting the proposition that a "constitutional cause of action should be implied directly from the Supremacy Clause").

Against these courts stand the Tenth Circuit and Supreme Judicial Court of Massachusetts, each of which has rejected the notion that the Supremacy Clause allows private litigants to sue state officials whenever they violate a federal statute—and the Seventh Circuit, which has declared this interpretation of the Supremacy Clause "highly doubtful." *See Moser*, 747 F.3d at 822–36; *Boston Med. Ctr. Corp.*, 974 N.E.2d at 1128; *Planned Parenthood of Ind.*, 699 F.3d at 983. There are also federal district-court opinions that reject or express doubts on this view of the Supremacy Clause. *See, e.g.*, *Mashpee Tribe v. Watt*, 542 F. Supp. 797, 806 (D. Mass. 1982) ("The Supremacy Clause does not support direct causes of action. . . . It only gives priority to federal rights created by a federal statute when they conflict with state law."), *aff'd*, 707 F.2d 23 (1st Cir. 1983); *Dartmouth-Hitchcock Clinic v. Toumpas*, 856 F. Supp. 2d 315, 321–22 (D.N.H. 2012) ("*Douglas* raises more questions than it

answers, and adds a measure of uncertainty to the law applicable in resolving plaintiffs' substantive claims in this case. . . . So, a critical legal question, potentially dispositive of plaintiffs' Supremacy Clause claim, remains unanswered.").

This split in authority is deep, well-developed, and features reasoned opinions on both sides of the issue. The issue could not possibly become more ripe for this Court's resolution.

II. THE NINTH CIRCUIT'S INTERPRETATION OF THE SUPREMACY CLAUSE IS UNTENABLE AND HAS SUBJECTED STATE OFFICIALS TO MANY IMPROPER LAWSUITS

The Court should grant certiorari not only to resolve this split in authority but also to relieve the States of the numerous private lawsuits to which they have been improperly subjected. The Ninth Circuit's view of the Supremacy Clause is not only irreconcilable with the Tenth Circuit's opinion in *Moser*, it is (more importantly) irreconcilable with the Constitution and the jurisprudence of this Court. All the more reason for this Court to grant certiorari to resolve whether the Supremacy Clause creates a private of action to sue state officials.

The Ninth Circuit's understanding of the Supremacy Clause is untenable for many reasons—not least of which is that it renders 42 U.S.C. § 1983 superfluous and allows private litigants to make an end-run around the decisions from this Court that purport to limit state-official liability. *See Douglas*, 132 S. Ct. at 1213 (Roberts, C.J., dissenting) ("[T]o say that there is a federal statutory right

enforceable under the Supremacy Clause, when there is no such right under the pertinent statute itself, would effect a complete end-run around this Court's implied right of action and 42 U.S.C. §1983 jurisprudence."). This Court has long held that state officials may be sued under section 1983 only when they violate federally protected *rights*—not whenever they violate some provision of federal *law*. *See Golden State Transit Corp. v. Los Angeles*, 493 U.S. 103, 106 (1989) ("Section 1983 speaks in terms of 'rights, privileges, or immunities,' not violations of federal law."); *see also Gonzaga Univ. v. Doe*, 536 U. S. 273, 286 (2002) ("[W]here the text and structure of a statute provide no indication that Congress intends to create new individual rights, there is no basis for a private suit, whether under §1983 or under an implied right of action."). Yet the Ninth Circuit (and other courts of appeals) have declared that state officials can be sued under the Supremacy Clause whenever they violate *any* provision of federal law—so long as a litigant can establish Article III standing. This means that Congress's decision to enact section 1983 was a meaningless gesture, and that Congress's decision to limit state-official liability to violations of federally protected "rights" has no legal effect.

All of this is well explained in Chief Justice Roberts's dissenting opinion in *Douglas*—and not a single member of this Court attempted to defend the Ninth Circuit's view of the Supremacy Clause in light of Chief Justice Roberts's objections. Yet there are even more reasons why the Ninth Circuit's interpretation of the Supremacy Clause should be repudiated.

A. Nothing In The Language Of The Supremacy Clause Purports To Authorize Private Litigants To Sue State Officials For Violating Federal Law

Before a court concludes that the Supremacy Clause establishes a private right of action by which citizens may sue a State's officials, it should consider and analyze the text of that constitutional provision. The Supremacy Clause provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. art. VI, cl. 2.

This language merely provides a choice-of-law rule directed to the "Judges in every State." Those judges must regard the Constitution, federal statutes, and treaties as "supreme," while subordinating all other forms of law (such as state law, international law, and judicial precedents) to the supreme law of the land. Nothing in the text of the Supremacy Clause purports to establish subject-matter jurisdiction for federal courts to adjudicate alleged conflicts between "supreme" and "non-

supreme" laws,[1] and it assuredly does not provide a cause of action authorizing private litigants to sue state officers (or anyone else) who violate a provision of supreme federal law. The power of federal courts to adjudicate these disputes, and the right of private litigants to bring these claims, must come from some other source of law.

The Supremacy Clause says nothing about the crucial issues that define this cause of action that the Ninth Circuit claims to have found in the Constitution. Who can be sued under this cause of action? Anyone who violates a federal law or treaty? Only state officials? The State itself? And what relief may be obtained from these alleged federal lawbreakers? Money damages or only injunctive relief? Would there be a right to jury trial?[2] If the Supremacy Clause had been understood to authorize private lawsuits by persons seeking to vindicate federal law, one would expect the Supremacy Clause to say something about these questions. Its silence on these matters indicates that it does not authorize lawsuits by private citizens against state officials.

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[1] For nearly 100 years, there was no general federal-question jurisdiction in the federal courts, and this Court has never held that the Supremacy Clause could create subject-matter jurisdiction that Congress has not conferred by statute.

[2] The Seventh Amendment secured the jury right only in cases at common law; most cases alleging a violation of a federal statute by state officials would fall outside the scope of the Amendment.

B. The Ninth Circuit's Interpretation Of The Supremacy Clause Is Irreconcilable With This Court's Rulings In *Alexander v. Sandoval*, *Horne v. Flores*, And *Maine v. Thibotout*

The Ninth Circuit's interpretation of the Supremacy Clause contradicts no fewer than three decisions of this Court.

The first is *Alexander v. Sandoval*, 532 U.S. 275 (2001), which explicitly and emphatically holds that private rights of action to enforce federal statutes must be created by Congress:

> Like substantive federal law itself, private rights of action to enforce federal law *must be created by Congress*. The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy. Statutory intent on this latter point is determinative. *Without it, a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute.* Raising up causes of action where a statute has not created them may be a proper function for common-law courts, but not for federal tribunals.

Id. at 286–87 (emphases added) (citations and internal quotation marks omitted). The Ninth Circuit's decision defies *Alexander* by recognizing a private right of action to enforce a federal statute that was *not* "created by

Congress." Worse, the Ninth Circuit turns *Alexander* on its head by authorizing private litigants to sue directly under the Supremacy Clause whenever Congress declines to create a cause of action to enforce a federal statute—a regime diametrically opposed to the holding of *Alexander*.

The second is *Horne v. Flores*, 557 U.S. 433 (2009). *Horne* holds that there is no private cause of action to advance a preemption claim under the No Child Left Behind Act (NCLB), because Congress did not provide for a cause of action to enforce that federal statute:

> *Whether or not HB 2064 violates § 7902*, see Brief for United States as Amicus Curiae 31–32, and n. 8 (suggesting it does), *neither court below was empowered to decide the issue.* As the Court of Appeals itself recognized, NCLB does not provide a private right of action. See 516 F.3d, at 1175. "Without [statutory intent], a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute." *Alexander v. Sandoval*, 532 U.S. 275, 286-287 (2001).

Horne, 557 U.S. at 456 n.6 (emphasis added).

The Ninth Circuit's interpretation of the Supremacy Clause is incompatible with this discussion in *Horne*. In the Ninth Circuit, any litigant may bring an NCLB "preemption" claim directly under the Constitution—regardless of whether the NCLB establishes a cause of action—even though *Horne* holds that federal courts are not "empowered to decide" these preemption claims. *See*

id. And there is no possible basis on which a court can distinguish "preemption" claims brought under the NCLB from "preemption" claims brought under the Medicaid Act; both statutes were enacted as spending legislation.

The third is *Maine v. Thiboutot*, 448 U.S. 1 (1980). *Thiboutot* held that litigants may use 42 U.S.C. § 1983 to enforce federal statutes (and not merely constitutional provisions) that create individual "rights," and defended this conclusion by noting that previous cases had allowed litigants to sue to enforce statutory provisions in the Social Security Act (SSA). Writing for the Court, Justice Brennan insisted that these earlier cases *necessarily relied on section 1983* because that was the *only possible source* for a cause of action to enforce the SSA:

> [O]ur analysis in several § 1983 cases involving Social Security Act (SSA) claims has relied on the availability of a § 1983 cause of action for statutory claims. In each of the following cases *§ 1983 was necessarily the exclusive statutory cause of action* because, as the Court held in *Edelman v. Jordan*, 415 U.S. [651], at 673–674 [(1974)], *id.*, at 690 (Marshall, J., dissenting), the SSA affords no private right of action against a State.

Thiboutot, 448 U.S. at 5–6 (emphasis added). This passage makes clear that when the Social Security Act (or any other federal statute) fails to authorize private lawsuits against state officials, the *only* basis on which a private litigant may sue to enforce that statute is section 1983.

If the Ninth Circuit is correct, then *Thiboutot* is wrong. The Ninth Circuit held that section 1983 is *not* the exclusive cause of action for enforcing the SSA (even though *Thibotout* says that it *is*) because on the Ninth Circuit's view private litigants may sue directly under the Supremacy Clause regardless of whether section 1983 could authorize the suit. That means that *Thiboutot* was wrong to state that previous lawsuits brought against state officials for allegedly violating the SSA necessarily relied on section 1983. Under the Ninth Circuit's reasoning, those pre-*Thibotout* cases could have relied on the Supremacy Clause to supply a cause of action, which means they do not have any implications for whether section 1983 is available to enforce statutory (as opposed to constitutional) rights.

C. The Ninth Circuit's Interpretation Of The Supremacy Clause Disables Congress From Precluding The Private Enforcement Of Federal Statutes And Treaties Against State Officials

The notion that the Supremacy Clause empowers private litigants to bring "preemption" claims against state officials who violate "supreme" federal law has radical and far-reaching implications. The Supremacy Clause gives treaties the same "supreme" status as federal statutes. *See* U.S. Const. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land ..."). So under the Ninth Circuit's reasoning, every treaty obliga-

tion that conflicts with state law should be enforceable through private lawsuits brought directly under the Supremacy Clause. Even when a treaty is non-self-executing or fails to provide a private right of action, a litigant could rely on the Supremacy Clause to supply the cause of action—just as the plaintiffs were permitted to do here. That would require this Court to repudiate its observation in *Medellin v. Texas*, 552 U.S. 491 (2008), that "[e]ven when treaties are self-executing in the sense that they create federal law, the background presumption is that '[i]nternational agreements, even those directly benefiting private persons, generally do not create private rights or provide for a private cause of action in domestic courts.'" *Id.* at 506 n.3 (quoting 2 Restatement (Third) of Foreign Relations Law of the United States § 907, Comment *a*, p. 395 (1986)).

The Ninth Circuit's holding also means that Congress is powerless to preclude private lawsuits to enforce federal law, because the Supremacy Clause is part of the Constitution and cannot be altered through ordinary legislation. Even a statute explicitly prohibiting private rights of action to enforce the Medicaid Act would be unable to prevent the "preemption" lawsuit brought by the plaintiffs in this case, because their purported cause of action is derived directly from the Constitution and is therefore immune from congressional revision. If the plaintiffs wish to concede that Congress may alter or abolish the cause of action on which they rely, then they must explain how Congress can change the meaning of the Supremacy Clause through ordinary legislation.

III. THIS CASE IS AN IDEAL VEHICLE FOR CONSIDERING THE IMPLIED-RIGHT-OF-ACTION ISSUE

This case presents an especially good vehicle for considering the implied-right-of-action issue.

First, the plaintiffs are not only seeking to enforce a federal statute that fails to provide a statutory cause of action, they are seeking to enforce *spending clause* legislation without a statute that authorizes private lawsuits. If this Court is unable to agree on the broader questions surrounding the meaning of the Supremacy Clause, this petition offers the possibility of a more narrow holding limited to federal spending legislation. The Court could, for example, hold that the Supremacy Clause cannot supply a cause of action to enforce *spending* legislation against state officials, and that any private right of action to enforce such legislation must be spelled out in clear and unambiguous statutory language. *See generally Pennhurst State Sch. and Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). As Justice Kennedy has explained:

> When the statute at issue is a Spending Clause statute, this element of speculation is particularly troubling because it is in significant tension with the requirement that Spending Clause legislation give States clear notice of the consequences of their acceptance of federal funds. . Accordingly, the Court must not imply a private cause of action for damages unless it can demonstrate that the congressional purpose to create the implied cause of action is so manifest that the State, when accepting fed-

> eral funds, had clear notice of the terms and conditions of its monetary liability."

Davis v. Monroe Cnty. Bd. of Ed., 526 U.S. 629, 656–57 (1999) (Kennedy, J., dissenting). Although the amici States would prefer a holding that precludes all implied rights of action under the Supremacy Clause, this case allows for a more narrow holding if the Court is unwilling to go that far. For this reason, the amici States respectfully submit that the Court's failure to reach agreement on the implied-right-of-action question in *Douglas* should not deter the Court from granting certiorari here.

Second, this case is distinguishable from *Ex parte Young*, 209 U.S. 123 (1908), and neither the petitioners' arguments nor the amici States' arguments would undermine the implied right of action in that case. *Ex parte Young* allows litigants to bring preemptive lawsuits to enjoin state enforcement proceedings against them. This cause of action does not rest on the Supremacy Clause but on principles of equity that allow potential defendants at law to assert their defenses preemptively by seeking the equitable remedy of an anti-suit injunction. *See* John C. Harrison, *Ex parte Young*, 60 Stan. L. Rev. 989 (2008). Five members of the Court have endorsed this understanding of *Ex parte Young*. *See Virginia Office for Protection and Advocacy v. Stewart*, 131 S. Ct. 1632, 1642 (2011) (Kennedy, J., concurring) ("[*Ex parte Young*'s] negative injunction was nothing more than the pre-emptive assertion in equity of a defense that would otherwise have been available in the State's enforcement proceedings at law."); *Douglas*, 132 S. Ct. at 1213 (Rob-

erts, C. J., dissenting) (endorsing Justice Kennedy's explanation of *Ex parte Young*).[3] This view of *Ex parte Young* is far more sound than Professors Wright and Miller's claim that *Ex parte Young* authorizes private lawsuits whenever a state official is accused of violating any provision of federal law. *See* 13B Charles A. Wright, Arthur R. Miller, & Edward H. Cooper, *Federal Practice and Procedure*: § 3566, at 102 (1984) ("The best explanation of *Ex Parte Young* and its progeny is that the Supremacy Clause creates an implied right of action for injunctive relief against state officers who are threatening to violate the federal Constitution or laws."). This too allows the Court to issue a narrow holding—a holding that preserves the implied right of action recognized in *Ex parte Young*, while rejecting the far-reaching Supremacy–Clause right of action established by the Ninth Circuit.

* * *

The deep circuit split that exists on this issue is alone sufficient to justify a grant of certiorari. That the States continue to be subjected to improper lawsuits on account of the Ninth Circuit's untenable interpretation of the Supremacy Clause only strengthens the case for certiorari. The amici curiae States respectfully ask this Court to grant the petition and hold that the Supremacy Clause

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[3] The Seventh and Tenth Circuits have also endorsed Justice Kennedy's explanation of *Ex parte Young*. *See Planned Parenthood of Indiana, Inc. v. State Dep't of Health*, 699 F.3d 962, 983 (7th Cir. 2012); *Planned Parenthood of Kansas and Mid-Missouri v. Moser*, 747 F.3d 814, 829–30 (10th Cir. 2014).

does not provide a basis for private lawsuits that have not been authorized by Congress.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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